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No. 84-

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PUBLIC UTILITY DISTRICT NO. 1 OF CHELAN COUNTY, WASHINGTON,
Petitioner,

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

In the instant case, the Federal Energy Regulatory Commission ("FERC") instituted a comprehensive regulatory proceeding to address the need for additional fish protection measures at five federally licensed and hydraulically related dams located in the middle portion of the Columbia River. During the pendency of this proceeding, the license for one of the dams, operated by Petitioner Public Utility District No. 1 of Chelan County, Washington, ("Chelan") expired. FERC issued a new license to Chelan, reserving the right to impose further conditions as might be appropriate once the comprehensive proceeding was completed. The United States Court of Appeals for the Ninth Circuit vacated FERC's order granting the license.

The questions presented are:

1) Whether in order to fulfill its obligations under Section 102 of the National Environmental Policy Act, 42 U.S.C. § 4332, the Federal Energy Regulatory Commission must prepare an environmental impact statement on relicensing of a hydroelectric project pursuant to Section 15 of the Federal Power Act, 16 U.S.C. § 808, where the relicensing involves no change in the status quo of the project or environment?

2) Whether Section 6 of the Federal Power Act, 16 U.S.C. § 799, bars the Federal Energy Regulatory Commission from issuing a full term license for a hydroelectric project containing a reopener clause authorizing the Commission to impose further conditions for the protection of fish resources upon completion of pending comprehensive proceedings.

PARTIES TO THE PROCEEDING SOUGHT TO BE REVIEWED

Public Utility District No. 1 of Chelan County, Washington

Federal Energy Regulatory Commission

Confederated Tribes and Bands of the Yakima Indian Nation

National Wildlife Federation

Malcolm Baldrige, Secretary of Commerce

Washington State Department of Fisheries

Washington State Department of Game

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OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, as modified, of which review is sought is reported at 746 F.2d 466 (1984). The initial opinion of the court of appeals and its order of October 30, 1984, modifying its initial opinion and denying petitions for rehearing are reproduced in the Appendix at 1-22 and 74-75. The orders of the Federal Energy Regulatory Commission set aside by the Ninth Circuit are reported at 15 F.E.R.C. ¶ 62,187, 19 F.E.R.C. ¶ 61,223 and 21 F.E.R.C. ¶ 61,264. The FERC's orders are reproduced at App. 23-73.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit is dated June 7, 1984. Timely petitions for rehearing were filed by Public Utility District No. 1 of Chelan County, Washington and by the Federal Energy Regulatory Commission. Those petitions were denied on October 30, 1984. This Court has jurisdiction to review the judgment below pursuant to 28 U.S.C. § 1254(1). An extension of time to February 27, 1985, in which to file the instant petition was granted by this Court on January 23, 1985.

STATUTES AND REGULATIONS INVOLVED

This case involves consideration of sections 6 and 15 of the Federal Power Act, 16 U.S.C. §§ 799 and 808 (1982), and section 102 of the National Environmental Policy Act, 42 U.S.C. § 4332 (1982). These provisions are reproduced in the Appendix at 74-76.

STATEMENT OF THE CASE

Public Utility District No. 1 of Chelan County, Washington ("Chelan") is the licensee of Rock Island Project No. 943 ("Rock Island"). Rock Island was first licensed in 1930 by the Federal Power Commission, the predecessor to the Federal Energy Regulatory Commission ("FERC" or "Commission"). Rock Island is one of ten hydroelectric projects on the Columbia River. Four of the projects, including Rock Island, are publicly-owned, operating under licenses issued by the Commission. These four projects, comprising five dams, are geographically located in the middle of the Columbia River. The other six projects are federally owned and operated, two upstream from the FERC licensed projects and four downstream from the FERC licensed projects.

Rock Island was the first project to span the Columbia River, and today it is a major energy resource of the

Pacific Northwest. It generates an average of 2780 million kilowatt hours of electricity annually, and provides electric service to customers of Chelan and Puget Sound Power & Light Company in central and western Washington.[1] The need to protect the fish resources of the river has been recognized since the inception of the Project. "Fish ladders" were installed at Rock Island at the time the dam was constructed to permit the upstream migration of adult anadromous fish.[2] Additional fish protection measures were installed when the Project was substantially redeveloped pursuant to a license amendment issued in 1974.

1. *FERC Proceedings*

On January 18, 1977, Chelan filed with the Commission its application for a new license. In contrast to a 1973 license amendment application in which Chelan proposed a major project expansion and for which the Commission prepared an environmental impact statement,[3] Chelan did not propose any new construction or change in operations in its application for license renewal. The application was filed solely because the existing license was due to expire in 1980.

The Washington State Department of Game ("WDG"), the Washington State Department of Fish ("WDF") and the National Marine Fisheries Service ("NMFS"), an agency within the United States Department of Commerce,

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[1] Order Issuing New License (Major), 15 F.E.R.C. ¶ 62,187 (May 13, 1981), App. 23.

[2] Anadromous fish are those species that ascend the rivers from the sea for seasonal breeding. The anadromous fish resources of the Columbia River include salmon and steelhead trout. Each year adult fish return from the ocean and migrate upstream to spawn. After hatching and growing in fresh water, juvenile fish migrate downstream to the ocean where, as adults, they are subject to ocean harvest.

[3] 51 F.P.C. at 1141, 1143 (1974), App. 89.

intervened in the proceeding, expressing concerns about Rock Island's effects on anadromous fish. They requested that additional studies be conducted to identify the Project's impacts on fish and wildlife and proposed various measures to be included in the new license such as specified minimum flows and spills to facilitate juvenile fish migration.

Contemporaneously, WDF/WDG, NMFS and the Confederated Tribes and Bands of the Yakima Indian Nation had requested the Commission to initiate a comprehensive proceeding on the same anadromous fish issues as they relate to all five of the federally-licensed Mid-Columbia dams, including Rock Island.[4] The Commission granted the requests and initiated an omnibus proceeding concerning all five licensed dams to develop a system-wide approach to protecting the anadromous fish resource in the Columbia River.

All parties to this case, except the National Wildlife Federation, became parties in that proceeding. The issues being addressed in the comprehensive proceeding ("Mid-Columbia proceeding") include: application of interim measures for the protection and enhancement of juvenile salmonids; development of long-term measures to provide equitable treatment among fish and wildlife, power generation and the other purposes for which the projects are operated and managed; and the impact of the projects, if any, on the treaty rights of the Yakima Indian Na-

[4] Operations of the four licensed projects and of the two upstream federal projects are hydraulically related; that is, the discharge of water from each dam flows directly into the reservoir of the next downstream project. None of the licensed projects can increase the level of minimum flow over a sustained period without an adequate release of water from the upstream federal storage projects. The energy generated from these six projects forms a significant part of the power resources of the Pacific Northwest. To optimize the generation of electricity to meet system requirements, the operation of each of the projects is coordinated on an hourly basis pursuant to contract.

tion.[5] In 1980, the parties to the Mid-Columbia proceeding reached an interim five-year settlement agreement to control the operations of each of the dams.[6] The agreement reached between Chelan and the agencies and Yakima Indian Nation was approved by the Commission on March 20, 1980. 10 F.E.R.C. ¶ 61,257, App. 121.

Meanwhile, no competing applicant had appeared to contest Chelan's application for license renewal. While Chelan's application was being processed by the Commission, the old license expired on January 20, 1980. As required by the Federal Power Act, 16 U.S.C. § 807, the Secretary of the Commission issued an annual license containing the same terms and conditions as the old license to Chelan on January 4, 1980 for the period January 20, 1980 to January 20, 1981. The Secretary also stated in the notice of issuance of annual license that if a new license was not issued by January 20, 1981, an annual license would be issued each year effective January 21 until a new license was issued. App. 150.

On May 13, 1981, the Director of the Office of Electric Power Regulation issued a new license to Chelan containing forty-four updated license conditions.[7]. 15

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[5] See Order Consolidating Proceedings (March 7, 1979), App. 109; Order Approving Interim Settlement (March 20, 1980), App. 121.

[6] Under the settlement, specific daily average minimum flows, which improve fish travel time downstream and thereby increase juvenile survival, were to be maintained at each dam. A minimum spill level of 10 percent was established for the spring migration period to enable juvenile fish to migrate over the spillways rather than through the powerhouse. The licensees agreed to provide 200,000 pounds of hatchery production capacity. The settlement also established a five-year study program to evaluate alternative collection and bypass systems, mortality rates of juvenile salmonids on a system-wide (four-project) basis, turbine mortality rates, spill effectiveness, and the feasibility of transporting juveniles downstream. Offer of Settlement, App. 136-141.

[7] Authority to act on uncontested license applications has been delegated by the Commission to the Director. 18 C.F.R. § 375.308 (1984).

F.E.R.C. ¶ 62,1[illegible], App. 23. The Director noted in the Order Issuing New License the concerns of WDG, WDF and NMFS about the Project's impact on anadromous fish. App. 26. Accordingly, a number of measures were included in the new license to ensure that the results of the fish protection studies then underway in the Mid-Columbia proceeding could be implemented once they became available. As the Director stated in the Order Issuing New License with respect to these "reopener" clauses:

> Under Articles 12 and 15 of this license, the Commission reserves the right to prescribe minimum flow releases and other changes in project operation to preserve and enhance fish and wildlife resources.

App. 27.

Chelan accepted the new license with all its terms and conditions, including the articles permitting changes in the Project structure and operations to ensure the adequate protection of fish resources.

The Director also stated in the order that, based upon an environmental assessment performed by the Commission Staff, relicensing under the conditions described above would not be a major federal action significantly affecting the quality of the human environment:

> Issuance of this license will permit continued project operation, which began over 50 years ago. No new construction, except for recreation development, or change in project operation is proposed . . . . On the basis of the record, including agency and intervenor comments and staff's independent analysis, it is found that issuance of a license for this project, as conditioned, is not a major Federal action significantly affecting the quality of the human environment.

App. 29-30.

On July 13, 1981, NMFS, joined by the Yakima Indian Nation, filed an appeal of the Director's order. The Com-

mission denied the appeal, finding that each of the issues raised was properly the subject of the Mid-Columbia proceeding. The Commission stated that:

> The piecemeal approach advocated by the Fisheries Service would be costly and probably would not obtain adequate results. The problems demand a system-wide approach. That is why we ordered the separate [Mid-Columbia] proceeding.

App. 61.

Responding to NMFS' contention that fish were not receiving equitable treatment with power production, the Commission stated:

> The new license is conditioned so that appropriate changes in project operation and structures can be made, if needed, to ensure that the fisheries resource receives the appropriate treatment. The decision, however, cannot be made without an adequate record. The separate proceeding has developed interim protections for the resource while a record is being developed to provide for long-term protection and enhancement of the resource.

App. 64.

NMFS sought rehearing of the Commission's denial of its appeal, reiterating the arguments that it had raised on appeal. Responding again to NMFS' contentions that the Commission's approach of issuing a new license with conditions permitting later inclusion of additional fish protection measures violated the National Environmental Policy Act ("NEPA"), the Commission stated in its Order On Rehearing:

> We find that the environmental record already compiled is adequate to support our order issuing a new license for the existing Rock Island Project, especially in light of our decision to include open-ended conditions pertaining to fisheries that will be finalized on the basis of the record compiled in the ongoing proceeding discussed above.

App. 70.

With respect to NMFS' renewed assertion that issuance of a new license with a reopener clause constituted inequitable treatment of fish, the Commission, recognizing its broad public interest responsibilities, stated:

> When there is only one applicant for the new license, it frequently makes sense to go ahead and issue the new license before the lengthy studies are complete, *so as to put in effect sooner the new license conditions, which relate to all aspects of the project and in many cases strengthen the protection of other aspects of the public interest in the project.* Because this procedure enhances our regulatory posture and enables us to better deal with environmental issues, we cannot concur in NMFS's complaint that the fisheries are being short-changed by our issuance of the new license.

App. 70-71 (emphasis added).

2. *Court of Appeals Proceedings*

The Secretary of Commerce, on behalf of NMFS, and the Yakima Indian Nation petitioned for review of the FERC orders to the United States Court of Appeals for the Ninth Circuit, and WDF/WDG and Chelan were granted leave to intervene. The Ninth Circuit held that a new license should not have been issued prior to completion of another EIS. The court acknowledged that it and other courts of appeals had held that actions that were phases of continuing activity did not require preparation of an EIS and that "viewed narrowly, relicensing fits within the FERC's characterization and comports with the cases cited above." App. 19. The court sought to distinguish the instant situation on the ground that "[r]elicensing is substantially equivalent to issuing an original license," App. 21, that there was "no doubt that if this action involved the decision to license new construction of a hydropower project such as Rock Island, an EIS would be required," App. 19, and that "[r]e-

licensing involves a new commitment of the resource . . . ." App. 21. The court of appeals stated that an EIS was necessary so that the Commission could consider the environmental impact of the options of relicense to Chelan, relicense to another licensee, and issuance of a non-power license even though there was no other applicant for a license and no one had suggested the non-power option as an alternative.[8]

The Ninth Circuit also held that the procedure adopted by the Commission of issuing a new license with conditions reserving authority to change project structures and operations upon completion of the Mid-Columbia proceeding violated the Federal Power Act and the Commission's regulations on the ground that "FERC must consider fishery issues *before*, not after, issuance of a license." App. 10 (emphasis in original). The Ninth Circuit rejected the arguments offered by the Commission and Chelan that use of "reopener clauses" such as those contained in the new license comported with FERC's statutory duty to consider fishery issues, and that the procedure chosen by FERC of deferring additional fish protection issues until completion of Mid-Columbia served the public interest. The principal reason supplied by the court for rejecting the arguments of FERC and Chelan was that "reopener clauses" curtail the Commission's discretion because once a license is granted the project may only be modified with the licensee's consent. The court also opined that "as a practical matter, the method used by FERC here removes the incentive for a speedy and efficient resolution of fishery issues." App. 14. Anomalously, the court held that FERC should have chosen the

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[8] In its initial opinion, the Ninth Circuit also stated that FERC should consider a fourth option of federal takeover of the Project. App. 20. However, in its order denying the petitions for rehearing of FERC and Chelan, the court of appeals acknowledged that federal takeover was precluded by the provisions of 16 U.S.C. § 828b and therefore need not be considered by FERC in this case. App. 75.

option of continuing to issue annual licenses to Chelan until the fish studies were complete on the ground that the Mid-Columbia fish measures could have been incorporated in an annual license through use of the "reopener" clause. App. 13.[9]

REASONS FOR GRANTING THE WRIT

The court of appeals' decision raises serious implications concerning FERC's ability to administer its licensing function under the Federal Power Act. The court of appeals' determination that an EIS must be prepared before an existing project is relicensed would over time create a substantial and unwarranted burden upon the Commission, the utility industry and ultimately the ratepayers served by the projects.

In its petition for rehearing to the court of appeals, the Commission estimated that over the next 20 years, approximately 400 projects will be considered for relicensing, and that preparation of an EIS requires an average of between one and two years to complete. This will create an enormous administrative burden upon FERC. Preparation of an EIS in every relicensing situtation also would have a significant financial and regulatory burden upon the industry. Applicants for new licenses would be required to prepare and file far more detailed environmental reports and studies than are currently required by FERC in order to enable FERC to prepare its EISs. Because these EISs would be prepared as a part of FERC's administration of Part I of the Federal Power Act, the cost thereof would be borne by

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[9] On essentially the same grounds, the court also held that it was a violation of FERC's regulations, 18 C.F.R. § 4.41 (1981), for FERC to defer preparation of Exhibit S, and noted that FERC's deferral of additional fish protection measures presumably also constituted a failure to meet its obligation to give fish "equal consideration" under the Fish and Wildlife Coordination Act and "equitable treatment" under the Pacific Northwest Electric Power Planning and Conservation Act. App. 14-18.

the licensees pursuant to Section 10(e) of that Act. Ultimately these additional costs would be passed through to the ratepayers who rely on these projects for electric service. The requirement of preparing EISs will also result in greater delay before a project is relicensed due to the time needed to prepare the EIS and to the likelihood of more extensive licensing proceedings before a new license can be issued. Preparation of an EIS involving such additional costs, delay and severe administrative burdens upon FERC is unwarranted when relicensing involves no change in project operations and thus cannot be considered a change in the status quo.

The court of appeals' determination that "reopener" clauses cannot be used by FERC to impose additional conditions upon completion of further studies or of related comprehensive proceedings will have an immediate and substantial impact upon the Commission's licensing function with respect to both existing and proposed projects. As stated in FERC's petition for rehearing, of the 125 licenses that the Commission issues on average each year, approximately 100 contain "reopener clauses." These generally relate to long-range issues such as fish protection, minimum flows and water quality. In many such instances, effective prelicensing studies cannot be conducted because the only way to determine the impact of the project in question is through monitoring of its actual operation. Under the Ninth Circuit's decision, the Commission and potential licensees are forced to decide what conditions to impose and what to accept without the necessary data.

It is thus beyond dispute that the decision of the Ninth Circuit constitutes a serious intrusion upon FERC's ability to structure its own procedures and upon its effort to fulfill its duties in what it believes to be the most orderly manner, which in the instant case is its determination that it should resolve fish issues on a system-wide basis in the pending Mid-Columbia proceeding. Because the

Ninth Circuit's decision is not mandated by statute, is not necessary to accomplish effective fish protection measures in the public interest, and constitutes a serious intrusion into the agency's effort to transact its business in an orderly fashion, Chelan respectfully submits that the instant petition for a writ of certiorari should be granted.

I. The Decision Below Is In Conflict With Settled Law That There Is No Need to Prepare an EIS Where There is No Change in the Status Quo of the Environment and That There is no Need to Consider Remote and Speculative Alternatives.

In examining NMFS' contention that an EIS was required, the Ninth Circuit recognized the principle, App. 19, that there is no need to prepare an EIS when there will be no change in the status quo, citing a number of the cases relied on by FERC and Chelan.[10] As stated above, the Commission had prepared an EIS in 1974 in connection with the amendment to the license approving construction of the second powerhouse in which it considered in detail similar concerns raised by WDF, WDG and NMFS. 51 F.P.C. at 1143, App. 89. Chelan's application for relicensing did not contain any proposals for further construction or change in project operations. The court of appeals, however, sought to distinguish all of these cases, stating that relicensing was more than a phase in a continuous activity, but was rather "a new commitment of the resource". App. 21.

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[10] *E.g., San Francisco v. United States*, 615 F.2d 498, 501 (9th Cir. 1980) ("the Navy was not required to evaluate the environmental consequences of the lease as if the Navy were proposing to establish this multi-million dollar industrial complex for the first time"); *Burbank Anti-Noise Group v. Goldschmidt*, 623 F.2d 115, 116-117 (9th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981) (no EIS was required when federal government aided the purchase of an existing airport by a local airport authority); *Committee for Auto Responsibility v. Solomon*, 603 F.2d 992, 1003 (D.C. Cir. 1979), *cert. denied*, 445 U.S. 915 (1980) (lease of existing parking lot to private firm did not change the status quo).

Chelan respectfully submits that the Ninth Circuit's decision in the instant case is inconsistent with the plethora of cases that hold that an agency need not prepare an EIS if no change in the status quo is contemplated. The Ninth Circuit's reasoning would render that principle meaningless since virtually any type of government action, such as a new lease, a new contract or a new license of any kind could be considered "a new commitment of the resource."

The extent of the Ninth Circuit's departure from the mainstream of cases is illustrated by the Fifth Circuit's decision in *Sierra Club v. Hassell*, 636 F.2d 1095 (5th Cir. 1981). In that case, a hurricane had destroyed a bridge, and the question was whether an EIS was required before the bridge could be rebuilt. The Sierra Club maintained that an EIS was required because the status quo should have been considered to be the area without the bridge. The Fifth Circuit held, however, relying on the Ninth Circuit's decision in *San Francisco v. United States*, 615 F.2d 498 (1980), that:

> it was not unreasonable for the agencies to conclude that the status of the environment to be considered was that with the bridge in place, prior to its destruction. The reconstruction project will only restore an environmental situation that had existed for twenty-four years. 636 F.2d at 1099.

In the instant case, the status quo certainly remains unchanged where no new construction is contemplated, and where relicensing simply continues in existence an environmental situation which has already been fully considered in the Commission's 1974 EIS. As in *Sierra Club v. Hassell*, it was thus not unreasonable for FERC to conclude that the status quo of the environment to be considered was with the Project in place.

In addition to being inconsistent with decisions concerning what constitutes the status quo for purposes of

evaluating whether an EIS is required, the Ninth Circuit's decision in the instant case is in conflict with the directions to the courts of appeals concerning their role in reviewing the sufficiency of an agency's consideration of environmental factors given by this Court in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978).

In its initial opinion, the court of appeals held that an EIS was required so that FERC could consider the varying environmental effects of federal takeover of the Project, relicense to Chelan, relicense to another licensee, or issuance of a non-power license. App. 20-21. In its order denying the petitions for rehearing of Chelan and FERC, the Ninth Circuit eliminated the alternative of federal takeover. However, it reaffirmed that an EIS was needed to consider issuance of a non-power license and relicense to another licensee. The court reached this conclusion despite the fact, recognized by the court itself, that "no new entity is seeking the right to operate Rock Island," App. 8, and that no one had applied for issuance of a non-power license.

As this Court stated in *Vermont Yankee*:

> . . . the term "alternatives" is not self-defining. To make an impact statement something more than an exercise in frivolous boilerplate the concept of alternatives must be bounded by some notion of feasibility.

435 U.S. at 551. The Court in *Vermont Yankee* also quoted from the decision of the Court of Appeals for the District of Columbia Circuit in *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827 (1972), to the effect that an agency need not consider "alternatives [that] are deemed only remote and speculative." *Id.* As the name implies, a non-power license involves complete cessation of power generation at the project. An applicant for a non-power license must include in his applica-

tion a "statement of the probable impact which conversion of the project to non-power use will have on the power supply of the system served by the project" and a "proposal for the removal or other disposition of power facilities of the project", 18 C.F.R. § 16.7(a) & (c). As stated above, the Rock Island Project is a major generating resource which is relied upon to serve the customers of Chelan and Puget Sound Power & Light Company in central and western Washington. Non-power use of Rock Island thus would be a most extreme and unjustifiable means of resolving environmental problems associated with the seasonal migration of juvenile anadromous fish at the Project.

II. The Decision Below is in Conflict With Decisions of the District of Columbia Circuit and With Congress's Approval of the Longstanding Commission Practice of Issuing Licenses With a Reservation of Authority to Modify Project Structures and Operations.

With respect to the Commission's power to modify the terms of existing licenses, the court of appeals rejected the argument by Chelan and FERC that the Commission could fulfill its statutory duty to consider fish issues by reserving the right to insert fish protection measures upon completion of the necessary studies in the pending Mid-Columbia proceeding. The basis for the court's rejection of the argument of Chelan and FERC was its belief that the Commission's power would be curtailed in the Mid-Columbia proceeding. App. 14.

This purported inability of the Commission to add fish protection measures at a later time is the linchpin of the court of appeals' holding that FERC violated the Federal Power Act, its own regulations, the Fish and Wildlife Conservation Act and the Pacific Northwest Electric Power Planning and Conservation Act. The court's holding that "FERC must consider fishery issues *before*, not after, issuance of a license," App. 10 (em-

phasis in original) is not supported by any of the case authority[11] or legislative history[12] which it cites. Neither Chelan nor FERC contested the fact that the Commission must consider fish issues. The authority relied upon by the Ninth Circuit does not prohibit the procedure adopted by FERC of issuing a new license with the condition that further fish measures could be included once the necessary studies were completed.

Indeed, FERC's interpretation of the statute is further buttressed by the legislative history surrounding a proposed amendment to the Federal Power Act in 1968. The proposed amendment would have permitted the Commission to review licenses during their term and modify project operations, if necessary. The House Interstate and Foreign Commerce Committee deleted the provision as "unnecessary in light of the . . . Commission's power to insert so-called open end[ed] conditions in hydroelectric power project licenses." H.R. Rep. No. 1643, 90th Cong., 2d Sess. at 2.[13] Congress thus recognized and ratified the

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[11] For instance, *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966), upon which the court heavily relied, App. 10-12, is clearly inapposite to the instant case. The language from *Scenic Hudson* quoted by the court of appeals refers to a determination by the FPC to refuse to admit certain testimony into evidence in a proceeding involving the initial licensing of an unconstructed project. Other than being support for the uncontroverted proposition that the Commission has the duty to make an inquiry into all relevant facts, *Scenic Hudson* has no bearing upon the validity of the procedure adopted in this case.

[12] The House Report quoted by the court, App. 9, is not inconsistent with the procedure adopted by FERC. In any event, its relevance is questionable given that it refers to "a license for a project subject to recapture. . . ." As the court acknowledged in the amendment to its opinion contained in the order denying FERC and Chelan's petitions for rehearing, the Rock Island Project is not subject to recapture.

[13] Later, during the consideration of the Bill on the House floor, all the Congressmen who participated endorsed a letter from the Commission as to the Commission's authority to impose "open

Commission's practice of issuing licenses with the understanding that all issues cannot always be resolved prior to license issuance, and that modifications may be necessary.

The Ninth Circuit's position in this case is also inconsistent in principle with the District of Columbia Circuit's decision in *Pacific Gas & Electric Co. v. FERC*, 720 F.2d 78 (D.C. Cir. 1983). Interpreting the same provision in question here, section 6 of the Federal Power Act, 16 U.S.C. § 799, the court stated that:

> FERC's power to limit license agreements and to reserve the right to require future alterations enables the Commission to accord section 6 the scope its terms indicate without unreasonably undermining the [Federal Power Act's] broader purpose set out in Section 10(a). FERC has discretion under section 6 to restrict license terms . . . and is also authorized to impose additional license conditions at its discretion.

Id. at 83-84.

Although arising in a somewhat different factual context,[14] the instant case is also inconsistent with the D.C. Circuit's recognition in *Swinomish Tribal Community v.*

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ended" conditions. That letter stated, 114 Cong. Rec. at 21440-21441 (July 15, 1968):

> In recent years the Commission, aware that it is unable, at the time of license issuance, to solve all of the problems that subsequently may have to be met if comprehensive development is to be maintained, has imposed . . . limited subject open end[ed] conditions . . . . Typical . . . conditions related to water releases, joint use of project reservoirs and properties . . . coordination of project operation both electrically and hydraulically with other projects . . . and construction . . . of facilities for the conservation . . . of fish and wildlife . . . .

[14] The application in issue was for a license amendment rather than for a new license, and the proposal that minimum flow requirements be attached to the license was not made until after issuance of the FERC's opinion.

FERC, 627 F.2d 499 (D.C. Cir. 1980), of the propriety of FERC's use of a separate proceeding to consider fish issues. The court stated that "the Commission's action in instituting a separate proceeding to consider the matter of downstream flow releases was well within the agency's discretion," *id.* at 510 (citing *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978)).

Even the Ninth Circuit has previously recognized the Commission's authority to use reopener clauses to impose further conditions upon a licensee. In *California v. FPC*, 345 F.2d 917 (9th Cir.), *cert. denied*, 382 U.S. 941 (1965), the Commission issued a fifty-year license containing a "reopener clause" concerning minimum stream flows that might be imposed by the Commission after the first twenty years of operation. The licensees challenged this provision on the ground that it violated Section 6 of the Act, 16 U.S.C. § 799, the same provision in question in the instant case. The Ninth Circuit rejected the licensees' argument in language which is equally applicable to this case:

> The section 6 requirement that the terms and conditions of a license be expressed in the license must not be given a construction which is impracticable of application. When the Commission reasonably foresees the possibility that a need may develop years in the future requiring, in the public interest, the imposition of a burden upon the licensee at that time, but either the dimensions of the need or the way of meeting it is not presently ascertainable, the license terms cannot possibly speak with definiteness and precision concerning the matter. Under these circumstances, it is sufficient, under section 6, to include in the license a condition reserving the problem, including the licensees' right to test the validity of any future action.

345 F.2d at 924-25.

The Ninth Circuit reasoned in this case that licensee consent is a prerequisite to the imposition of post-license issuance conditions. However, the extent of the Commission's power to impose conditions and of Chelan's "right to test the validity" of any conditions the Commission might seek to impose are the same whether in the context of issuance of a license for another fifty year term or in a separate proceeding to modify the project upon completion of the ongoing fish studies. The court's effort to distinguish its *California v. FPC* decision on the ground that the license in that case did contain some fish measures cannot withstand scrutiny, particularly since, in the instant case, there are also fish protection measures which were added to the old license through the 1974 amendment [15] and were incorporated into the new license. Moreover, under the Ninth Circuit's reasoning in this case that FERC must obtain a licensee's consent to any modifications, the reopener clause provision in the *California* case would have been without effect, regardless of what other provisions were contained in the original license.[16]

This Court has frequently stated that administrative agencies should be permitted "to pursue methods of inquiry capable of permitting them to discharge their multi-

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[15] The bulb turbines installed at the second powerhouse have a substantially different design from the Kaplan turbines at other Columbia River projects and cause significantly fewer fish mortalities. A structural bypass, which permits some downstream migrants to circumvent the turbines, was also installed pursuant to the 1974 amendment. Thirdly, a new fish ladder was also constructed. See App. 84.

[16] In contrast to the court's belief that FERC's power to modify licenses is limited in the case of new licenses, the court appeared to believe that the Commission could use the "reopener clause" to insert new conditions into annual licenses and that the Commission should have used the vehicle of annual licenses until fish protection studies were completed. App. 13. This position is lacking in logic or support of any kind.

tudinous duties," *e.g.*, *FCC v. Schrieber*, 381 U.S. 279, 290 (1965) (quoting *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940)), and has often admonished the courts of appeals "against engrafting their own notions of proper procedures upon agencies entrusted with substantive functions by Congress." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 525 (1978). Although an administrative agency's discretion in structuring its proceedings may be circumscribed by statute, the result reached by the Ninth Circuit is not required by the Federal Power Act. The decision that FERC may not use reopener clauses to impose additional conditions upon completion of comprehensive proceedings such as Mid-Columbia accordingly constitutes an unwarranted intrusion upon FERC's ability to structure its own procedures.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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